

In the United States Court of Federal Claims

No. 13-1023

Filed: June 9, 2017

MW BUILDERS, INC. f/n/a
MW BUILDERS OF TEXAS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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Evidence; Trial Record.

ORDER

This Order resolves the Plaintiff's August 17, 2016 Motion To Enter Additional Evidence, and Plaintiff's August 26, 2016 Motion To Enter Exhibits 679, 680 and 681.

On April 5, 2016, the court issued a Scheduling Order that stated: "No further exhibits may be added to Plaintiff's exhibit list after April 1, 2016, except by agreement of the parties or by leave of the court." ECF No. 59 at 1.

On May 2, 2016, Plaintiff filed a Fourth Amended Exhibit List that included three new exhibits that were not previously listed: PX 679, PX 680, and PX 681. ECF No. 94. On that same day, the Government filed a Response To Plaintiff's Supplemental Exhibit List, arguing that PX 679, PX 680, and PX 681, should be excluded from evidence, because they violated the court's April 5, 2016 Scheduling Order. ECF No. 95.

The trial took place between May 4, 2016 and May 10, 2016 in Austin, Texas. TR at 1–1329. On the first day of trial, *i.e.*, May 4, 2016, the court admitted Plaintiff's Fourth Amended Exhibit List into evidence, subject to the Government's objections to: PX 679, PX 680, and PX 681, on which the court reserved ruling. TR 6–8. On the last day of trial, *i.e.*, May 10, 2016, the court left the record open and requested that Plaintiff's expert, Neil Miltonberger, provide the court with a Supplemental Report regarding Bergelectric Corp.'s pass-through labor inefficiency and damages claims. TR at 1282–83, 1314.

On August 17, 2016, Plaintiff filed a Motion To Enter Additional Evidence ("8/17/16 Mot."), seeking to admit Neil Miltonberger's supplemental report into evidence. ECF No. 114.

On August 26, 2016, Plaintiff filed a Motion To Enter Exhibits 679, 680, and 681 (“8/26/16 Mot.”). ECF No. 118. On September 2, 2016, the Government filed a Response to Plaintiff’s August 26, 2016 Motion (“Govt. Resp.”) (ECF No. 120) and an Opposition to Plaintiff’s August 17, 2016 Motion (“Govt. Opp.”) (ECF No. 121). In the alternative, if the court grants Plaintiff’s August 17, 2016 Motion, the Government requests that the court also grant it leave to file the rebuttal report of its expert, Stephen Weathers. Gov’t Opp. at 3. On September 9, 2016, Plaintiff filed a Reply In Support Of The August 17, 2016 Motion (“Pl. Reply”). ECF No. 122.

The court has discretion to close and reopen the trial record, and may do so *sua sponte*. See *Zenith Radio Corp. v. Hazeltine*, 401 U.S. 321, 331 (1971) (“Like a motion to under Rule 15(a) to amend the pleadings, a motion to reopen to submit additional proof is addressed to [the court’s] sound discretion.”); see also *Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir. 1995) (“This rule pertains even when the district court opts to reopen the record on its own initiative.”).

At the end of trial, the court left the record open and requested a Supplemental Report from Mr. Miltonberger. TR at 1282–83, 1314. Accordingly, the court grants Plaintiff’s August 17, 2016 Motion to admit Mr. Miltonberger’s Supplemental Report into evidence. Likewise, the court grants the Government leave to file its expert Mr. Weathers’ rebuttal report into evidence.

In addition, Plaintiff requests that the court admit three additional exhibits into evidence: PX 679, PX 680, and PX 681. 8/26/16 Mot. at 1. Plaintiff asserts that these exhibits were identified late, because of the Government’s voluminous document production after discovery ended. 8/26/16 Mot. at 4. Although the court took note of the Government’s objection to these late exhibits on the first day of trial, TR at 7–8, the Government subsequently failed to show that it would be prejudiced by their inclusion in the record. Accordingly, the court also grants Plaintiff’s August 26, 2016 Motion.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN
Chief Judge